

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE Mortgage Electronic Registration) MDL 09-2119-PHX-JAT
Systems (MERS) Litigation)
MDL 09-2119-PHX-JAT)

ORDER

This Order applies to:
CV 11-8085-PCT-JAT

Lady Jennifer Barone, individually and on
behalf of a class of similarly situated
individuals,

Plaintiff,

v.

MERSCORP Incorporated, a Delaware
corporation, Mortgage Electronic
Registration Systems, Incorporated, a
Delaware corporation,

Defendants.

Pending before the Court is Mortgage Electronic Registration Systems, Inc. and
MERSCORP, Inc.'s (collectively, "MERS") Motion to Dismiss (MDL 09-2119, Doc. 1640).¹

The Court now rules on the Motion.

I. FACTUAL BACKGROUND

¹ Defendant JPMorgan Chase Bank, N.A. filed a joinder to the Motion to Dismiss
(Doc. 1642).

1 In 2005, Carmine Barone, Plaintiff's ex-husband entered into a loan transaction,
2 secured by a Deed of Trust, with Ampro Mortgage to purchase property located at 7058 East
3 Horizon Way, Prescott Valley, Arizona (the "Property"). MERS, acting solely as nominee
4 for the Lender, was listed as beneficiary under the Deed of Trust. Carmine and Plaintiff
5 became joint tenants of the property in 2007. Following a divorce in 2008, Carmine
6 quitclaimed his interest in the property to Plaintiff and Plaintiff was awarded exclusive title
7 to the property pursuant to a divorce decree. Plaintiff, however, was not a signatory on the
8 note or Deed of Trust and does not allege that she ever became the obligor under the
9 promissory note or the trustor on the Deed of Trust.

10 In her Complaint, Plaintiff alleges that the promissory note on the loan originally
11 secured by the Deed of Trust became unsecured because the Note was separated from the
12 Deed of Trust through the process of the Note being securitized, transferred and/or assigned
13 to mortgage-backed security pools rendering the obligation under the Note unsecured.
14 Plaintiff alleges that, because the Deed of Trust is no longer security for the note because of
15 the securitization of the note, her residence is not subject to foreclosure proceedings.
16 Plaintiff further alleges that, because MERS was not listed in the promissory note, it had no
17 power to assign any beneficial interest in the note.

18 Plaintiff also alleges that Defendant MERS and/or Defendant Chase Home Finance
19 violated Arizona Revised Statutes section 33-420 because they recorded a Corporate
20 Assignment of Deed of Trust on the Property, wherein MERS attempted to assign all
21 beneficial interest in the Deed of Trust together with the notes or notes therein described.
22 Plaintiff alleges that Jennifer Hamlin, acting as assistant secretary for MERS, Inc. signed the
23 document, but she was not employed by MERS and did not have authority to assign the
24 document as an assistant secretary for MERS and had no knowledge of any of the
25 representations contained in the document.

26 Plaintiff alleges that Defendant Chase Home Finance recorded a Substitution of
27 Trustee related to the property, which was false because it was based on an invalid
28

1 assignment of the beneficial interest in the Deed of Trust to Chase and Chase did not have
2 requisite authority to appoint the successor trustee. Plaintiff alleges that the Substitution of
3 Trustee and Notice of Trustee's Sale were notarized in blank prior to being signed, and the
4 signatures that appear on those documents were not actually signed by the parties that the
5 signatures claim to represent.

6 **II. PROCEDURAL BACKGROUND**

7 Plaintiff brought this action against Chase, MERSCORP Inc., and Mortgage
8 Electronic Registration Systems, Inc. Thereafter, the case was transferred to the consolidated
9 multidistrict litigation. After reviewing the complaint and motion to bifurcate, this Court
10 remanded claims 1-3 and 6 of Plaintiff's Complaint and retained jurisdiction over claim 4
11 (wrongful foreclosure), claim five (false documents), claim 7 (declaratory relief), and claim
12 8 (injunctive relief). Defendants now move to dismiss the remaining claims in this case for
13 failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil
14 Procedure 12(b)(6).

15 **III. LEGAL STANDARD**

16 To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet
17 the requirements of Rule 8. Rule 8(a)(2) requires a "short and plain statement of the claim
18 showing that the pleader is entitled to relief," so that the defendant has "fair notice of what
19 the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S.
20 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

21 Although a complaint attacked for failure to state a claim does not need detailed
22 factual allegations, the pleader's obligation to provide the grounds for relief requires "more
23 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
24 will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The factual
25 allegations of the complaint must be sufficient to raise a right to relief above a speculative
26 level. *Id.*

Rule 8's pleading standard demands more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than blanket assertions will not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, if accepted as true, states a claim to relief that is "plausible on its face." *Id.* Facial plausibility exists if the pleader pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Plausibility does not equal "probability," but plausibility requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts alleged in a complaint in the light most favorable to the drafter of the complaint, and the Court must accept all well-pleaded factual allegations as true. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true a legal conclusion couched as a factual allegation, *Papasan*, 478 U.S. at 286, or an allegation that contradicts facts that may be judicially noticed by the Court, *Shwarz*, 234 F.3d at 435.

IV. ANALYSIS

At the outset, the Court notes that Plaintiff's claims, at least in part, are based on the premise that the promissory note has been split from the deed of trust as a result of the securitization of the Note, and thus Defendant must prove that it holds the note in order to conduct a non-judicial foreclosure. This argument has been rejected by the Arizona Supreme Court. See *Hogan v. Washington Mutual Bank, N.A.*, No. CV-11-0115-PR, ___ P.3d___, 2011 WL 7905162, at *1 (Ariz. May 18, 2012) ("We hold that Arizona's non-judicial foreclosure statutes do not require the beneficiary to prove its authority or 'show the note' before the trustee may commence a non-judicial foreclosure."). Further, in *Cervantes*, the Ninth Circuit Court of Appeals recognized "the notes and deeds are not irreparably split: the

1 split only renders the mortgage unenforceable if MERS or the trustee, as nominal holders of
2 the deeds, are not agents of the lenders.” *Cervantes v. Countrywide Home Loans, Inc.*, 656
3 F.3d 1034, 1044 (9th Cir. 2011). Plaintiff attempts to distinguish *Cervantes*, by arguing that
4 she alleged that there was no agency relationship between MERS and the lender.

5 In *Cervantes*, the plaintiffs claimed that “all transfers of the interests in the home loans
6 within the MERS system are invalid because the designation of MERS as a beneficiary is a
7 sham and the system splits the deed from the note.” 656 F.3d at 1044. The Court of Appeals
8 rejected such a widespread attack on the MERS system, stating “[e]ven if we were to accept
9 the plaintiffs’ premises that MERS is a sham beneficiary and the note is split from the deed,
10 we would reject the plaintiffs’ conclusion that, as a necessary consequence, no party has the
11 power to foreclose. The legality of MERS’s role as a beneficiary may be at issue where
12 MERS initiates foreclosure in its own name, or where the plaintiffs allege a violation of state
13 recording and foreclosure statutes based on the designation.” *Id.* at 1044. Plaintiff has
14 failed to distinguish this case from *Cervantes* through her conclusory allegation that an
15 agency relationship did not exist between MERS and the lender due to the securitization of
16 the Note. As in *Cervantes*, the Deed of Trust in this case likewise stated that MERS was
17 acting “solely as a nominee for Lender and Lender’s successors and assigns.” *Id.* at 1042.

18 Further, this Court has previously rejected the argument that “as a lender’s nominee,
19 MERS cannot act as a lender’s agent.” *Bean v. BAC Home Loans Servicing, L.P.*, No CV11-
20 553-PHX-GMS, 2012 WL 171435, at *1 -2 (D. Ariz. Jan. 20, 2012) (citing *Fontenot v. Wells*
21 *Fargo Bank, N.A.*, 129 Cal.Rptr.3d 467, 479–80 (2011)).

22 Accordingly, to the extent that Plaintiff’s claims rely on her theory that the promissory
23 note has been split from the deed of trust because of the securitization of the promissory note
24 or that MERS lacked authority to assign the deed of trust, Plaintiff has failed to state a claim
25 upon which relief can be granted with respect to this theory.

26 The Court will now individually discuss Defendants arguments as to why each Claim
27 should be dismissed for failure to state a claim upon which relief can be granted.
28

1 **A. Claim Four - Wrongful Foreclosure**

2 Defendants argue that Plaintiff has failed to state a claim for wrongful foreclosure
3 under Arizona law because Arizona has not recognized the tort of wrongful foreclosure,
4 Plaintiff's claim for wrongful foreclosure is based on the premise that MERS lacked the
5 authority to assign the Deed of Trust, which is a meritless legal theory, and Plaintiff cannot
6 state a claim for wrongful foreclosure because she was in default on her loan.

7 In Response, Plaintiff argues that her wrongful foreclosure claim should survive the
8 pleading stage because "[i]t is plausible that a computer-based registration system had no
9 standing to foreclose, or that any assignee of such an entity similarly has no standing to
10 foreclose." This standing argument has been expressly rejected by the Arizona Supreme
11 Court. *See Hogan*, 2011 WL 7905162, at * 1. Further, this Court has repeatedly held that,
12 even if Arizona recognized a wrongful foreclosure cause of action, Plaintiff must allege lack
13 of default for her wrongful foreclosure action to survive a motion to dismiss. *See, e.g., In re*
14 *Mortgage Elec. Registration Sys. (MERS) Litig.*, MDL Docket No. 09-2119-JAT, 2011 WL
15 4550189, at *6 (D. Ariz. Oct. 3, 2011) ("even if Arizona recognizes this tort, the same
16 common law requirement for plaintiff to allege lack of default remains.").

17 Because Plaintiff has admitted that her loan payments were not current and her loan
18 was in default, she has failed to state a claim upon which relief can be granted for wrongful
19 foreclosure and Claim Four will be dismissed. *See, e.g., id.* ("By failing to plead that their
20 loans are not in default, Plaintiffs' claim for wrongful foreclosure is barred as a matter of law
21 and will be dismissed for failure to state a claim.").

22 **B. Claim Five - False Documents**

23 Defendants argue that Claim Five of Plaintiff's Complaint should be dismissed
24 because Arizona Revised Statutes section 33-420 does not apply to assignment of mortgages
25 or deeds of trust and Plaintiff lacks standing to assert the robo signing allegations. This Court
26 has repeatedly held that Arizona Revised Statutes section 33-420 does not apply to
27 assignment of mortgages or deeds of trust and Plaintiff lacks standing to assert robo signing
28

allegations. *See, e.g., In re Mortgage Elec. Registration Sys. (MERS) Litig.*, MDL Docket No. 09–2119–JAT, 2011 WL 4550189, at *5 (D. Ariz. Oct. 3, 2011) (A.R.S. § 33–420 does not apply to assignments, substitution of trustees, and notices of trustee’s sales and plaintiffs lack standing on robo signing allegations, because “as third-party borrowers, [they] are uninvolved and unaffected by the alleged [recorded] [a]ssignments, and do not possess standing to assert a claim based on such”); *Henkels v. JP Morgan Chase Bank, Nat’l Ass’n*, No. CV 11–00299–PHX–JAT, 2012 WL 10380, at * 2–3 (D. Ariz. Jan. 3, 2012) (same).

Plaintiff argues that every one of these cases misinterprets the false document statute. The Court disagrees. Accordingly, Claim Five of Plaintiff’s Complaint will be dismissed for failure to state a claim upon which relief can be granted.

C. Claims Seven (Declaratory Relief) & Nine (Injunctive Relief)

Plaintiff admits that her requests for injunctive and declaratory relief “are based on her claims for violations of state law as set forth in Counts 4 and 5 of the Complaint.” (Doc. 1652 at 15). Accordingly, because Plaintiff has failed to state a claim upon which relief can be granted on Counts Four and Five, the subsidiary claims for relief must also be dismissed. Accordingly, Counts Seven and Nine will also be dismissed.

V. LEAVE TO AMEND

Plaintiff requests leave to amend if the Court determines that her Complaint has failed to state a claim upon which relief can be granted. The Ninth Circuit has instructed district courts to grant leave to amend when dismissing a case for failure to state a claim, “unless the court determines that the pleading could not possibly be cured by the allegations of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995)). Because Plaintiff’s claims depend on legal theories that have repeatedly been rejected by this Court, and in light of the foregoing analysis, the Court finds that Plaintiff’s Complaint could not be cured by allegations of other facts and, thus, allowing Plaintiff to amend her Complaint would be futile. Accordingly, the Court will not grant Plaintiff leave to amend.

